93-614

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RORY KEITH JONES,

Petitioner

versus

BRAQUE WILSON, ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Whether a United States District Court in a civil case proceeding in forma pauperis, under 28 U.S.C. § 1915(d), must conduct a conference to make an initial review regarding the merits of the claim prior to dismissing such claim?

LIST OF PARTIES

The parties to the proceedings below and in this Court are petitioner, Rory Keith Jones. Other potential parties are Defendants Braque Wilson, Robert A. Jones and Randolph A. McDonald.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RORY KEITH JONES,

Petitioner

versus

BRAQUE WILSON, ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached in the appendix hereto.

JURISDICTION

Petitioner seeks review of a decision by the United States Court of Appeals for the Fifth Circuit dated June 15, 1993. (Appendix). The opinion of the Court of Appeals was in response to an appeal from an Order of the United States District Court dated July 29, 1992, which dismissed this action in its entirety. (Appendix).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

28 U.S.C. § 1915(d):

> The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Rules of the Supreme Court of the United States:

Rule 10:

.1 A review of writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(c) When a state court or United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

42 U.S.C. § 1983:

Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

> proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This action was instituted on March 10, 1987, by Petitioner under 42 U.S.C. § 1983 et. seq. Petitioner's claims arise from his arrest on November 3, 1982, after which he was charged with four (4) counts of aggravated assault. Thereafter, Defendant Robert A. Jones was appointed to represent Petitioner with regard to these criminal charges and Defendant Braque Wilson acted as the probation officer with regard to Petitioner's charges.

Petitioner alleges that through a conspiracy between Defendant Jones and Defendant Wilson, Petitioner was advised that he would be eligible for parole and therefore plead no contest to the

charges. However, after so pleading, Petitioner learned that he was not eligible for parole and was sentenced to serve forty-five (45) years in the Texas Department of Corrections. Petitioner immediately sought appeal from this sentence and was represented by Defendant Randall A. McDonald on the appeal. Defendant McDonald filed an Anders brief and stated that he could find no grounds on which to base such an appeal. Petitioner's appeal was subsequently denied.

Petitioner has brought this civil action claiming that all three (3) Defendants were conspiring against him to deprive him of his constitutional and civil rights. The hearing at which the sentence was imposed, was conducted on December 7, 1983, and this action was filed on March 10, 1987.

The United States District Court has previously found that Petitioner's action was told during his time of incarceration until a change in Texas law effective September 1, 1987. After Petitioner exhausted his habeas corpus remedies, the undersigned counsel was appointed to represent Petitioner and requested from the Court a pretrial conference in order to discuss issues relevant to the case. No such pretrial conference has ever been granted.

Thereafter, the United States District Court entered an order dated June 30, 1992, requesting counsel to advise the Court if Petitioner wanted to proceed with his action. At that time, the undersigned counsel believed that Petitioner did not believe he had a justiciable cause of action under 42 U.S.C. § 1983 and no longer wanted to pursue this claim. As a result, this

action was allowed to be dismissed for want of prosecution on July 29, 1992. Counsel for Petitioner has since learned that Petitioner does believe he has a justiciable action and wants to pursue same. The misunderstanding between counsel and Petitioner was apparently the result of difficult communications due to Petitioner's incarceration and was learned by counsel for Petitioner when Petitioner filed his Notice of Appeal on August 13, 1992. Thereafter, counsel for Petitioner contacted Petitioner and has now moved forward with prosecuting this appeal.

It is the position of Petitioner that due to the misunderstanding with counsel and the need for a pretrial conference with the United States District Court to determine if Petitioner has claims which are justiciable and which the Court should allow to be

pursued, this case should be remanded to the District Court with instructions that a pretrial conference be conducted and the Court determine if Petitioner has claims which the Court should allow to be pursued.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT NEED NOT CONDUCT A HEARING PRIOR TO DISMISSING THIS ACTION.

It is well settled law that when a party files an action in forma pauperis under 28 U.S.C. § 1915, the Court should conduct an investigation as to whether the claims asserted by the Plaintiff would allow recovery on the part of the Plaintiff. 28 U.S.C. § 1915(d); Flowers v. Turbine Support Division, 507 F.2d 1242 (5th Cir. 1975); Phillips v. Mashburn, 746 F.2d 782 (11th Cir. 1984); Brown v. Pena, 441 F. Supp. 1382 (E.D.

Fla. 1977); Ex Parte Tyler, 70 FRD 456 (E.D. Mo. 1976). This investigation should go beyond the mere recitations of the pleadings in an attempt to determine if there is any factual basis to support the pleadings themselves. James v. Alfred, 835 F.2d 605 (5th Cir. 1988) cert. den'd. 108 S. Ct. 1599; Dawson v. Lynch, 423 F.2d 1136 (9th Cir. 1970). Further, appointed counsel has a duty to advise the Court if they question the viability of the Plaintiff's claims. Roman v. Jeffes, 904 F.2d 192 (3rd Cir. 1990); Anders v. California, 386 U.S. 738 (1967) reh den 388 U.S. 924.

In this action, Petitioner has alleged a conspiracy between the probation officer and two (2) court appointed counsel to deprive him of his constitutionally guaranteed civil rights. In order to prevail on such a claim, Petitioner must be able to show that the

Defendants were not acting merely in their capacities as officers of the Court, but that they were intentionally and conspiratorially plotting to deprive the Petitioner of his rights. Freeze v. Griffith, 894 F.2d 172 (5th Cir. 1988); O'Brien v. Colbath, 465 F.2d 358 (5th Cir. 1972); Crosby-Bey v. Jansson, 586 F. Supp. 96 (D.C. Col. 1984); Bartee v. Yanoff, 514 F. Supp. 96 (E.D. Pa. 1981) aff'd. 672 F.2d 309 (3rd Cir. 1982) cert. den. 459 U.S. 916; Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970).

Petitioner would argue that before this Court should dismiss an action based on 42 U.S.C. § 1983 and proceeding under 28 U.S.C. § 1915, the Court should conduct a conference or a hearing for the purpose of determining if the Petitioner has claims which should be adjudicated. When the undersigned counsel originally sought a pretrial conference after being

appointed to represent Petitioner in this action, it was for the purpose of obtaining such a determination by the Court. To dismiss this action prior to such a conference is unfair and prejudicial to Petitioner. To allow the case to proceed without question is unfair to the potential Defendants and a burden on the entire judicial system.

Unfortunately, due to miscommunications between Petitioner and his counsel, Petitioner's counsel did not advise the Court in June of 1992 of Petitioner's now apparent desire to move forward with this action and to conduct such a conference. Petitioner would show that to fail to reinstate Petitioner's action due to this miscommunication would also be unfair and prejudicial to Petitioner and would not serve the legitimate ends of justice. Petitioner has made clear, despite advice of

counsel, that he wants to pursue this action and, pending a determination by the District Court that there is a proper action to pursue, Petitioner is prepared to move forward to reach an ultimate determination of Petitioner's claims.

The opinion of the Court below sidesteps the main issue in this case, which is whether the District Court must conduct a pretrial conference or hearing to analyze the merits of Petitioner's claim prior to any dismissal. The Court's statement that counsel for Petitioner did not request a pretrial conference but rather requested a postponement until at least February of 1991 is without support. The inference to be drawn from this statement is that if a party or counsel seeks a pretrial conference from the Court but requests that it not be conducted until after a certain date, this is in fact no request

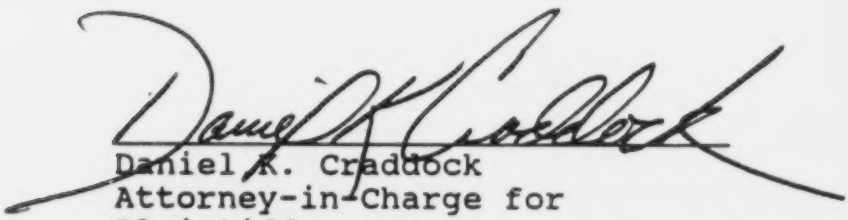
at all. Surely this cannot be the case. By merely adding a suggested time frame for conducting a requested pretrial conference, a party cannot be found to have waived their request for a pretrial conference.

CONCLUSION

For these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STUMPF & FALGOUT



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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2693
Summary Calendar

RORY KEITH JONES,

Plaintiff-Appellant,

versus

BRAQUE WILSON, ET AL.,

Defendants-Appellees.

Appeal from the
United States District Court
for the
Southern District of Texas
(CA-H-87-0759)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

PER CURIAM:*

Rory Keith Jones appeals the dismissal with prejudice of his civil rights action for failure to prosecute. Finding no abuse of discretion in the dismissal, we affirm.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principals of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

On November 3, 1982 Texas authorities arrested Jones on four counts of aggravated robbery. Jones entered a nolo contendere plea and was sentenced to 45 years imprisonment. The conviction was affirmed on appeal. Proceeding pro se and in forma pauperis, he then invoked 42 U.S.C. § 1983, seeking damages in the amount of $36 million, alleging Braque Wilson, the investigating probation officer, and Robert A. Jones, his trial attorney, conspired to induce his plea by erroneously convincing him of his eligibility for parole. The complaint further alleged that Randy McDonald, his attorney on appeal, denied him effective assistance of counsel by filing an Anders[1] brief. After a Spears[2] hearing,

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[1] Anders v. California, 386 U.S. 738 (1967).

[2] Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

the district court stayed the action pending exhaustion of habeas corpus remedies, and ordered Jones to advise as to the status of those proceedings at 60-day intervals.

After Jones exhausted his habeas corpus remedies, the district court appointed counsel and entered a scheduling order for pretrial proceedings. In July 1990, Jones moved for amendment of the scheduling order and pretrial conference date. The district court, in September 1991, ordered Jones to confer with opposing counsel to reach agreement as to a new pretrial schedule and, failing an agreement, to move for a pretrial conference. Thereafter, however, Jones did nothing. Nearly two years later, the district court ordered Jones to show cause why his action should not be dismissed for failure to prosecute, and on July 29, 1992 dismissed

the action with prejudice. Jones filed a pro se notice of appeal. In his appellate brief, appointed counsel states that he permitted dismissal of this action only after a conference following which he --apparently in error-- understood that Jones no longer wished to press his claims.[3]

Analysis

We review dismissals for failure to prosecute only for abuse of discretion.[4] Recognizing the drastic nature of such a dismissal, when with prejudice, we have "generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff."[5] In view of Jones's noncompliance with the

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[3]During this conference, counsel apparently informed Jones that, in his opinion, this action lacked merit.

[4]E.g., Colle v. Brazos County, Texas, 981 F.2d 237 (5th Cir> 1993).

[5]Id. (quoting Durham v. Florida East Coast R. Co., 385 F.2d 366, 367 (5th Cir. 1967).

district court's September 1990 order, the two-year period during which he took no action in pursuit of his claims, the absence in the record of any justification for this delay, and Jones's failure to invite our attention to any factual basis[6] or authority indicating that the district court erred,[7] we find

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[6]Jones suggests that because a misunderstanding with his attorney resulted in failure to oppose dismissal, we should set aside the district court's action. No evidence in the record, however, indicates the existence of such a misunderstanding, and in any event, any misunderstanding regarding opposition to dismissal fails to explain the long delay which led to the order to show cause.

[7]Jones suggests that the district court should not have dismissed his action without conducting a pretrial hearing which he requested. We initially note that Jones never requested such a hearing. Rather, the motion to which he refers in his brief requested postponement of any pretrial conference until at least February 1991. The district court's subsequent order required a further motion by Jones to obtain such a hearing. In any event, Jones's argument fails to address the sole issue presented by this appeal -- whether this inaction justified the dismissal in this case.

no abuse of discretion in the district court's action.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RORY KEITH JONES,	§	
	§	
Plaintiff,	§	CIVIL ACTION
	§	NO. H-87-0759
v.	§	
	§	
BRAQUE WILSON,	§	
ET AL.,	§	
	§	
Defendant.	§	

ORDER

Because of (i) Plaintiff's failure to comply with the Order dated September 13, 1991, issued by the Honorable John D. Rainey, United States District Judge, (ii) Plaintiff's failure to show cause why this case should not be dismissed pursuant to this Court's Order dated June 30, 1992, and (iii) Plaintiff's failure to prosecute this action, the Court finds that this case should be dismissed for want of prosecution.

SIGNED at Houston, Texas, this 29th day of July, 1992.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RORY KEITH JONES	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-87-0759
BRAQUE WILSON, ROBERT A.	§	
JONES, BRAQUE WILSON,	§	
RANDY McDONALD, AND/OR	§	
THE STATE OF TEXAS	§	

PLAINTIFF'S MOTION TO REVISE DOCKET
CONTROL ORDER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW, RORY KEITH JONES, Plaintiff herein and hereinafter referred to as "Plaintiff" and moves the Court to extend the Docket Control Order previously entered herein respectfully stating as follows:

1. This Court has previously entered a Docket Control Order, a copy of which attached hereto as Exhibit "A." Counsel for Plaintiff was appointed by this Court to represent Plaintiff in this matter by Order dated April 10, 1990. As

a result of the substantial work which is necessary to prepare this case on behalf of Plaintiff, counsel for Plaintiff would show that it is impossible to meet the deadlines set forth in the Court's Docket Control Order.

2. As a result, Plaintiff would request that said Docket Control Order be revised and that the discovery cut-off in this case be moved to December 31, 1990. In addition, Plaintiff would request that a pretrial conference be scheduled no sooner than February, 1991. This is necessary due to the fact that the named Defendants have not been served by Plaintiff and that no meaningful discovery can take place until they have been served and responded herein.

3. Plaintiff seeks to fully prosecute this case, but was unable to do so prior to the appointment of the undersigned counsel due to Plaintiff's

incarceration in state prison. Plaintiff will move forward with diligent prosecution of this case and requests that this Court allow Plaintiff the opportunity to fully develop the facts herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon consideration of this Motion, that said Motion be in all things granted; and for such other and further relief, both general and special, to which Plaintiff may himself to be justly entitled.

Respectfully submitted,

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